United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

Cf. 7th C.C. Pet
6-11-71
(1)

BRIEF FOR APPELLANT

409

In The

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24588

UNITED STATES OF AMERICA

vs.

ROBERT WESTON,

Appellant

Appeal from a Judgment
of the United States District Court
for the District of Columbia

Guy M. Bayes
1666 33rd Street, N. W.
Washington, D. C. 20007
Attorney for Appellant
(Appointed by this Court)

QUESTIONS PRESENTED

In the opinion of the appellant the following issues are presented.

1. Whether the trial court erred in denying appellant's motions for judgment of acquittal which were based on the contention that there was insufficient evidence on which the jury could reasonably find appellant guilty of larceny, or unauthorized use of a vehicle?

2. Whether the trial court erred in admitting in evidence the testimony of the Government witness Officer Petros acquired by him as a result of his interrogation and arrest of appellant?

3. Whether the trial court erred in refusing to admit in evidence the testimony of the appellant concerning the possession and use of the automobile involved by another person?

4. Whether the trial court erred in instructing the jury in regard to an inference of guilt which might be drawn from the appellant's possession of the automobile involved?

5. Whether it was error for the trial court to submit to the jury both the charges of Grand Larceny and Unauthorized Use of a Vehicle, and to sentence appellant on both offenses?

This case has not been before this Court previously under the same or similar title, or any other name or title.

I N D E X

	Page
Questions presented	i
Jurisdictional Statement	1
Statement of Case	2
References to Rulings	2
Statement of Points	8
Summary of Argument	8
Argument	
I. The trial court erred in denying appellant's motions for judgment of acquittal, as the evidence was insufficient to sustain a conviction on either of the two counts of the indictment.	9
II. The trial court erred in admitting in evidence testimony of officer Petros in regard to information obtained by the officer following, and as a result of, his illegal arrest of appellant on June 25, 1969.	13
III. The trial court erred in excluding testimony offered by appellant concerning the basis for appellant's belief that the driver of the automobile involved had the permission of the owner to use it.	14
IV. The trial court erred in instructing the jury in regard to the inference of guilt which might be drawn from the possession of property recently stolen.	14
V. The trial court erred in convicting and sentencing appellant on both the charges of larceny and unauthorized use of a vehicle, as the offense of unauthorized use is a lesser offense included in the offense of larceny and both offenses arose from the same set of facts and circumstances.	15
Conclusion	16
Certificate of service	16

TABLE OF CASES

	Page
Austin v. United States, 127 U. S. App. D. C. 180 (1967), 382 F2d 129	12
Cephus v. United States, 117 U. S. App. D. C. 15 (1963), 324 F2d 893	12
Gilbert v. United States, 94 U. S. App. D. C. 323 (1954), 215 F2d 334	12
Hardy v. United States, 118 U. S. App. D. C. 253 (1964), 335 F2d 288	14
Henry v. United States, 361 U. S. 98	11, 14
Hiet v. United States, (1966) 124 U. S. App. D. C. 313. 365 F2d 504	12
Kelly v. United States, 111 U. S. App. D. C. 397 (1961), 298 F 2d 310	11, 14
McKnight v. United States, 114 U. S. App. D. C. 40, 309 F2d 660	12
*Pendergast v. United States, No. 21,031 U. S. App. D. C. (1969), 416 F2d 776	12, 15
*Sibron v. State of N. Y., 392 U. S. 40	11, 12, 14
*Smith v. United States, 120 U. S. App. D. C. 160 (1965), 344 F2d 545	11, 12, 14
Travers v. United States, 118 U. S. App. D. C. 276 (1964), 335 F2d 698	12
*United States v. Di Re, 332 U. S. 581	11, 12, 14
*Wong Sun v. United States, 371 U. S. 471	11, 12, 14

*Cases or authorities chiefly relied upon are marked by asterisks.

In The

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24588

UNITED STATES OF AMERICA

v.

ROBERT WESTON,

Appellant

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant was indicted in the District of Columbia for alleged violations of Title 22, Sections 2201 and 2204 (Grand Larceny and Unauthorized Use of Vehicle), to which he pleaded not guilty. He was tried on May 5 and 6, 1970 in the United States District Court for the District of Columbia by a judge and jury and was found guilty on both charges. A judgment of conviction and sentence was entered by the District Court on July 31,1970. From said judgment Appellant has taken an appeal to this Court.

This Court has jurisdiction under Title 28, U.S.C., Sec. 1291.

REFERENCES TO RULINGS

The judgment presented for review is the judgment of conviction and commitment of the appellant for the offenses of Grand Larceny and Unauthorized Use of a Vehicle, (Title 22, Sections 2201 and 2204, D.C. Code), entered by the District Court July 31, 1970.

STATEMENT OF THE CASE

In a 2-count indictment appellant was charged with Grand Larceny (22 D.C. Code 2201) and Unauthorized Use of a Vehicle. He was tried before District Court Judge William B. Bryant on May 5 and 6, 1970 and was found guilty of both charges. On July 31, 1970, appellant was sentenced to a term of not less than two years nor more than eight years on count one and not less than twenty months nor more than five years on count two, to be served concurrently.

The charges arose out of the alleged theft of a 1968 Pontiac automobile owned by Louie Lamar Bailey on June 5, 1969, from the place where he had parked it, in front of his apartment at 1631 Euclid Street, N.W., and the alleged unauthorized use of the automobile on June 25, 1969, at 14th and T Streets, N.W.

The Government's evidence consisted of the testimony of two witnesses, Louie Lamar Bailey and Metropolitan Police Officer Salvatore Petros.

Mr. Bailey testified that on June 5, 1969 when he awakened about 7:00 a.m., he discovered that his car was missing from the front of the apartment and his television and car keys were gone (Tr. 28).

He had come home after midnight after visiting a friend in the 3300 Block of Mt.Pleasant Street, N.W. (Tr. 36), unloaded his pockets on the coffee table in his apartment and gone to bed (Tr. 28). He next saw his automobile in the parking lot at the 13th Precinct (Tr.29). He did not know appellant Weston and did not give him or anyone else permission to use his automobile on June 5, 1969, or June 25, 1969. There were four other keys taken from his apartment. There were two keys to his apartment, two car keys and another key, on two chains, all attached and contained in a leather key case, which was returned to him by Officer Petros the day the case was before the Grand Jury (Tr. 30).

When he retired for the evening on June 5, 1969, he locked the slant lock at the bottom of his apartment door but not the top (security) lock. He lived alone (Tr. 31). There was only one door to his apartment, which was on the second floor. There were nine windows in his apartment. Some of the windows were open for ventilation that night (Tr. 32). The next morning he found his door ajar. (Tr. 36) He had been driving his car during the evening and when he came home, on June 5, 1969, alone in the car. He did not drive on 14th Street, N.W. (Tr. 37). He denied that he drove the car up 14th Street and picked up appellant Weston and a man named Ernest (Tr. 38-39)

His television set was located across the room facing anyone entering the front door. There was a bedroom in the apartment (Tr. 39-40). Anyone lying on the bed looking toward the exit could see the corner of the door if it was open. There was a slight alcove between the living room and the bedroom, where the bath was located, and there was a slight hallway, and you could pull the door open to look in,and

you might see the corner of the door. From the bed one could not see the television. He had a stereo located on the right wall. He did not play any records on the stereo on the night of June 5, 1969 (Tr. 40). He had another set of car keys in his apartment (Tr. 41).

Officer Petros testified that on June 25, 1969, he was on foot patrol in the 1900 Block of 14th Street, N.W., when he saw appellant Weston sitting behind the driver's wheel of a 1963 Pontiac automobile which was at the curb with the motor running (Tr. 51-52).

Mr. Weston threw from the left front window a bag containing trash which landed out in the street. Officer Petros approached Mr. Weston and questioned him concerning this. Mr. Weston immediately alighted from the car, picked the bag up and placed the bag into the back of the auto. Officer Petros then asked Mr. Weston for his driver's license and registration card. Mr. Weston informed him that he left them at home; that the auto was registered to his wife but that he was making the monthly installment payments on it. Officer Petros then took Mr. Weston directly across the street to a Police call box where he called the Traffic Division concerning his driver's license and was informed it was revoked. He then placed Mr. Weston under arrest for operating a vehicle after a driver's license revocation and took him to Third District Headquarters where an investigation was made concerning the vehicle due to the fact that no registration card was exhibited (Tr. 52-55).

After this investigation was made through teletype, the Police Administration informed Officer Petros that the plates which were being exhibited on the vehicle were not the proper plates for this vehicle. A check was then made in reference to the serial number and Officer

Petros was informed by Police teletype that this vehicle was out and was stolen. And that the Pontiac should bear a different tag number. He then went back to the vehicle and checked the license plates again and discovered the correct license for it was concealed by another plate which was placed in front of it. As a result of his investigation he learned that the owner of the Pontiac was Louie Bailey. When he first saw Mr. Weston in the car there were keys in the ignition and the motor was running (Tr. 55). The car keys later came into his possession and they consisted of approximately five keys within a black leather case. He never talked to Mr. Bailey but informed Mr. Bailey's office that he had Mr. Bailey's car and possibly his keys. He did not see any other person in the Pontiac automobile when he saw Mr. Weston in it. He did not make any search or inquiry for any other person having anything to do with the car at that time or place (Tr. 56).

The Government rested.

Counsel for appellant moved the Trial Court for a Judgment of Acquittal on the ground that the evidence presented by the Government was not sufficient to justify submitting the case to the jury. The motion was denied.

Appellant Weston then testified as follows:

On June 5 and 25, 1969, he was employed at the Touchdown Club at 20th and L Streets, N.W. On June 25, 1969, he left work about 10:00 p.m., went to a Chinese food carry-out restaurant at 7th and O Streets, N.W., bought a small carton of food and started walking home by way of 14th Street, N.W. (Tr. 63-64, 93). At 14th and R Streets, N.W., an acquaintance named Ernest drove past in the 1968 Pontiac automobile described by Mr. Bailey and Officer Petros and gave appellant a

ride on his way home, stating that he had to make one stop, at 14th and T Streets, N.W., which he did. Ernest stopped the car at the first parking space, beside a tree, went into a building and came out, and was about to leave, having the car motor running and lights on, when a man in a disabled car directly ahead came up to Ernest and asked him to help him get his car started (Tr. 64). Ernest got out of his car and went to the disabled car to help the driver. Appellant Weston, was getting out of the car to help them. He could not get out on the right side because of the tree blocking the door, so he slid across the seat. He had a box of Chinese food in his hand and was eating from it. In opening the left door, as the car was on a slope, the door started to close and in attempting to stop the door, he let go of the food box. He got out of the car and was picking up the box when he saw Officer Petros beside him (Tr. 66).

Mr. Petros said "Don't you know, boy, you are not to litter the streets?" Appellant replied that he was sorry, it was an accident and he would pick up the box. Officer Petros looked at appellant and asked if he had arrested him before. Appellant said he had not. Officer Petros asked appellant his name and appellant said it was Robert Weston. Officer Petros asked appellant if he had a permit or something like that with him. Appellant said he did and looked in his pocket and showed him some papers with his name on them, including papers showing he was employed at the Touchdown Club, but Officer Petros said he was not satisfied and insisted that appellant produce his driver's license. Appellant said he was not driving - that he was just trying to get out of the car - and asked why he needed a driver's license. Officer Petros replied that appellant was under the wheel. After further inquiry as

to whether appellant could produce his driver's license, Officer Petros took appellant to a Police call box, made a telephone call and then arrested appellant charging him with driving after revocation of his license (Tr. 65-69).

Appellant denied that he stole the automobile, used or operated it or did anything whatever in regard to the car except to be in it as a passenger on June 25, 1969, on 14th Street, N.W. He stated that he did not believe the car to be stolen, had no information to indicate that Ernest did not have a right to operate it, and, on the basis of two prior incidents, believed that Ernest had permission of the owner, Mr. Bailey, to use it (Tr. 69).

One incident occurred on June 5 or 10, 1969, when Mr. Bailey picked him and Ernest up in the car at 14th and Girard Streets, took them to his apartment at 1631 Euclid Street, gave them some drinks and tried to get them to have sexual relations with him (Tr. 69-71), following which Ernest left the apartment before appellant, drove away in Mr. Bailey's Pontiac automobile (Tr. 69-75). He saw Ernest a few days later at a party (Tr. 78). Then on June 25, 1969, Ernest was driving the same car and picked appellant up in it at 14th and R Streets, N.W. (Tr. 64). Appellant described Mr. Bailey's apartment in detail (Tr. 73, 97-98). The Government agreed his description was accurate.

Appellant's motion for judgment of acquittal on both counts of the indictment was renewed and again denied (Tr. 102).

The jury returned a verdict of guilty on both counts of the indictment and from the judgment of conviction and sentence following the verdict this appeal is taken.

STATEMENT OF POINTS

1. There was insufficient evidence on both counts of the indictment to sustain a conviction.

2. The evidence obtained by officer Petros by exploitation of his illegal interrogation and arrest of appellant, without probable cause, was inadmissible.

3. Appellant's proposed testimony as to what Ernest, the driver of the complainant's automobile, stated concerning his permission from the owner to use it was admissible in evidence.

4. The trial court's instruction to the jury that an inference of guilt might be drawn from appellant's presence in the complainant's automobile, or, exclusive possession of it after it had recently been stolen, was erroneous.

5. As the alleged offenses of larceny of the automobile and unauthorized use of the vehicle were based on the same incident, it was error for the trial court to convict and sentence appellant on both counts of the indictment.

SUMMARY OF ARGUMENT

I. The trial court erred in denying appellant's motions for judgment of acquittal, as the evidence was insufficient to sustain a conviction on either of the two counts of the indictment.

II. The trial court erred in admitting in evidence testimony of officer Petros in regard to information obtained by him following and as a result of his illegal arrest of appellant on June 25, 1969.

III. The trial court erred in excluding evidence offered by appellant, consisting of appellant's testimony as to what the driver of the complainant's automobile stated concerning his authorization from the owner to use it.

IV. The trial court erred in instructing the jury that, upon the evidence in this case, an inference of guilt of the offenses charged might be drawn from the exclusive possession by the appellant of the complainant's automobile.

V. It was error for the trial court to convict and sentence appellant on both counts of the indictment, as the alleged offense of larceny and unauthorized use of the automobile were based on the same incident.

ARGUMENT

I. The trial court erred in denying appellant's motions for judgment of acquittal, as the evidence was insufficient to sustain a conviction on either of the two counts of the indictment.

(Tr. 3, 5-6, 28-30, 49-55, 63-80, 102)

The Government's evidence, set forth in the foregoing Statement of the Case, consisted of the testimony of two witnesses, Louie Bailey, owner of the automobile allegedly stolen, and police officer Salvatore Petros. As to the larceny charge, neither witness gave any direct evidence that appellant stole the automobile. In regard to the charge of unauthorized use of a vehicle, Mr.

Bailey's testimony did not connect appellant with the automobile at any time. He said he did not know appellant (Tr. 30). He merely said that he owned the car, parked it in front of his apartment on June 5, 1969, after midnight and found it missing, as well as his car keys, the next morning; that he gave no one permission to use it; and that he did not see it again until after June 25, 1969, when he saw it at the police precinct (Tr. 28-30).

Officer Petros did not learn anything about the car or appellant until the night of June 25, 1969, when he saw appellant sitting behind the driver's wheel of the car, which was then at the curb with the motor running (Tr. 51-2). At that time appellant threw a bag containing trash from the left front window of the automobile into the street. He questioned appellant concerning this and appellant immediately got out of the car, picked up the bag and placed it into the back of the car (Tr. 52). He then asked appellant for his driver's license and registration card and was informed by appellant that he had left them at home and that the automobile was registered in his wife's name but he was making the monthly payments on it. Officer Petros then took appellant directly across the street to a police call box where he called the traffic division concerning appellant's driver's license and was informed it was revoked. He then placed appellant under arrest for operating a vehicle after a driver's license revocation and took him to Third District Police Headquarters where an investigation was made concerning the vehicle due to the fact that no registration card was exhibited (Tr. 52-5).

After this investigation was made through teletype, they informed Officer Petros that the plates which were being exhibited on the vehicle were not the proper plates for this vehicle and that it was out and was stolen, and that the car should bear a different tag number. He then went back to the vehicle and checked the license plates again and discovered the correct license for it was concealed by another plate which was placed in front of it. As a result of his investigation he learned that the owner of the Pontiac was Louie Bailey. When he first saw appellant in the car there were keys in the ignition and the motor was running (Tr. 55). He did not see any other person in the Pontiac automobile when he saw appellant in it. He did not make any search or inquiry for any other person having anything to do with the car at that time or place (Tr. 56).

Officer Petros' testimony as to all information obtained by him following, and as a result of, his asking appellant for his driver's license and registration card (Tr. 52-5) was inadmissible, because it was obtained by the exploitation of illegality, being the result of the seizure and arrest of appellant without probable cause. Smith v. United States, 120 U. S. App. D. C. 160 (1965), 344 F2d 545; Sibron v. State of N. Y., 392 U. S. 40; United States v. Di Re, 332 U. S. 581; Wong Sun v. United States, 371 U. S. 471; Terry v. Ohio, 392 U. S. 1; Henry v. United States, 361 U. S. 98; Kelly v. United States, 111 U. S. App. D. C. 397 (1961), 298 F2d 310.

After denial of appellant's motion for judgment of acquittal appellant testified (TR. 63-81) that he did not take the car or use it or operate it and that the only connection he had with it was riding in it as a passenger on two occasions - on June 5 or 10, 1969 (Tr. 69-

71) when Mr. Bailey, the owner, picked him and Ernest up in the car on 14th Street, N. W., and took them to his apartment, after which Ernest drove away, alone, in the car, and on June 25, 1969, when Ernest, driving the car at 14th and R Streets, N.W., gave him a ride toward his home. Appellant testified that he believed from what had occurred during these two incidents and from seeing Ernest again between these dates that Mr. Bailey had loaned Ernest his car, that it was not stolen but that Ernest was driving it with Mr. Bailey's consent prior to and on June 25, 1969, when he gave appellant a ride. In view of the circumstances of appellant's being in the car and his explanation of his presence there, there was no evidence from which an inference of guilt of theft or unauthorized use of the vehicle could properly be drawn. Pendergrast v. United States, No. 21,031 U. S. App. D. C. (1969), 416 F2d 776; Gilbert v. United States, 94 U. S. App. D. C. 323 (1954), 215 F2d 334.

Since the testimony of officer Petros was inadmissible, there was no competent evidence to support either charge, and appellant's motion for judgment of acquittal, renewed after all the evidence had been received, should have been granted. Smith v. United States, supra; Sibron v. State of New York, supra; Hiett v. United States (1966), 124 U. S. App. D. C. 313, 365 F2d 504; Cephus v. United States (1963), 117 U. S. App. D. C. 15, 324 F2d 893; McKnight v. United States, 114 U. S. App. D. C. 40, 309 F2d 660; Travers v. United States, 118 U. S. App. D. C. 276; Austin v. United States (1967), 127 U. S. App. D. C. 180, 382 F2d 129; United States v. Di Re, supra; Wong Sun v. United States, supra.

II. The trial court erred in admitting in evidence testimony of officer Petros in regard to information obtained by the officer following, and as a result of, his illegal arrest of appellant on June 25, 1969.

(Tr. 52-5; 63-9)

The circumstances under which appellant was arrested June 25, 1969 (Tr. 52-5, 63-9), show that officer Petros' testimony was based on information obtained by him illegally, in violation of appellant's constitutional rights, as a result of his interrogation and arrest of appellant without probable cause.

The officer had no prior information whatever concerning appellant or the automobile in which he was seated. His sole reason for approaching appellant was that he saw appellant throw a bag containing trash from the car into the street. This minor incident appeared to be closed when the appellant picked up the bag containing the trash and put it in the car (tr. 52, 66). The officer had no basis for believing or suspecting that appellant had committed or was committing any offense other than the minor one involving the bag of trash, which he showed no intention of prosecuting. Therefore he had no reason or right to request appellant to exhibit a driver's license and registration card, and his arresting appellant, taking him to the police call box, then to the police station and making the continuing investigation upon which the charges of driving after revocation of license, larceny and unauthorized use of a vehicle were based, as well as the officer's testimony in support of the latter two charges, were illegal and inviolation of appellant's rights

under the Fourth, Fifth and Sixth Amendments of the United States Constitution. Since the evidence given by officer Petros covering all information obtained by him following his taking appellant to the police call box was the result of exploitation of illegality it was inadmissible. Smith v. United States, 120 U. S. App. D. C. 160 (1965), 344 F2d 545; Kelly v. United States, 111 U. S. App. D. C. 397 (1961), 298 F2d 310; Sibron v. State of N. Y., 392 U. S. 40; United States v. Di Re, 332 U. S. 581; Wong Sun v. United States, 371 U. S. 471; Henry v. United States, 361 U. S. 98.

III. The trial court erred in excluding testimony offered by appellant concerning the basis for appellant's belief that the driver of the automobile involved had the permission of the owner to use it.

(Tr. 77-9)

Appellant offered his testimony in regard to what the driver of the complainant's automobile, Ernest, represented to appellant as to the authorization given to Ernest by the ownerto use the automobile prior to and on June 25, 1969. The trial court, in the absence of objection by counsel for the Government, refused to admit the proffered testimony (Tr. 77-9). The proffered testimony should have been admitted. Hardy v. United States, 118 U. S. App. D. C. 253 (1964), 335 F2d 288.

IV. The trial court erred in instructing the jury in regard to the inference of guilt which might be drawn from the possession of property recently stolen.

(Tr. 135-41)

Over objection of appellant's counsel the trial court instructed the jury, in regard to count one (larceny), that they were

permitted to infer from the unexplained or unsatisfactorily explained possession of recently stolen property by the accused that the accused was guilty of taking the property if, in their judgment, the inference was warranted by the evidence as a whole (Tr. 136). The court gave a similar instruction as to the second count (unauthorized use of a vehicle, and also instructed the jury what circumstances the jury must find to have existed before the inference of guilt could be drawn (Tr. 145-41). The instruction, as given, was erroneous, as it shifts the burden of proof from the Government to the defendant, since, in effect, it requires him to give a satisfactory explanation of his possession of the property or be held guilty of stealing it, or using it without the owner's authorization.

A further defect in the instruction is that it does not require, as a precondition to the applicability of the inference rule, that the property be recently stolen (Tr. 136). Pendergast v. United States, No. 21,031 U. S. App. D. C. (1969), 416 F2d 776. Also, in this case, the appellant's presence in the car was not unexplained, or unsatisfactorily explained, but was accounted for by appellant in a manner consistent with his claim of innocence.

V. The trial court erred in convicting and sentencing the appellant on both charges, since the second count (unauthorized use of a vehicle) is a lesser offense included in the first count (grand larceny) of the indictment and both offenses arose from the same set of facts and circumstances.

(Tr. 51-2; 122-39; Judgment of Conviction and Sentence July 31, 1970)

As there was no evidence connecting the appellant with the automobile involved except on one occasion, June 25, 1969 (Tr. 51-2), and count two (unauthorized use of a vehicle) is a lesser offense

included in count one (larceny), it was error for the trial court to submit both counts to the jury and to convict and sentence appellant on both counts. Title 22, Sections 2201 and 2204, D. C. Code, 1967 edition; Fifth and Sixth Amendments, United States Constitution.

CONCLUSION

The judgment of the United States District Court for the District of Columbia should be reversed.

Respectfully submitted,

Guy M. Bayes
1666 33rd Street, N. W.
Washington, D. C. 20007
Attorney for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellant was served upon the United States Attorney for the District of Columbia this 7th day of December, 1970.

Guy M. Bayes

[illegible]

United States Court of Appeals

for the District of Columbia Circuit

No. [illegible]

[illegible]

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney,

JOHN A. TERRY,
JOHN S. HANSON,
Assistant United States Attorneys.

Cr. No. 1573-62

INDEX

	Page
Counterstatement of the Case	1
The Government's Case	2
The Defense Case	4
Argument:	
I. The facts within the officer's knowledge amounted to probable cause to arrest appellant for operating a motor vehicle without a permit.	5
II. The court correctly instructed the jury regarding appellant's possession of the recently stolen car.	6
III. The evidence was sufficient for the jury to convict appellant of both offenses.	7
Conclusion	9
Appendix	11

TABLE OF CASES

**Bailey* v. *United States*, 128 U.S. App. D.C. 354, 389 F.2d 305 (1967)	6
**Bell* v. *United States*, 102 U.S. App. D.C. 383, 254 F.2d 82, *cert. denied*, 358 U.S. 885 (1958)	6
Carroll v. *United States*, 267 U.S. 132 (1925)	6
Coleman v. *United States*, 137 U.S. App. D.C. 48, 420 F.2d 616 (1969)	6
**Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375 F.2d 332 (1967)	8
**Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947)	8
Evans v. *United States*, 98 U.S. App. D.C. 122, 232 F.2d 379 (1956)	8
Houston v. *District of Columbia*, 149 A.2d 790 (D.C. Ct. App. 1959)	5
Mincy v. *District of Columbia*, 218 A.2d 507 (D.C. Ct. App. 1966)	3
**Pendergrast* v. *United States*, 135 U.S. App. D.C. 20, 416 F.2d 776, *cert. denied*, 395 U.S. 926 (1969)	6, 7
Richardson v. *District of Columbia*, 134 A.2d 492 (D.C. Ct. App. 1957)	5
Taylor v. *United States*, 259 A.2d 835 (D.C. Ct. App. 1969)	5
United States v. *Harris*, D.C. Cir. No. 23,254, decided November 27, 1970	7
United States v. *Howard*, —— U.S. App. D.C. ——, 433 F.2d 505 (1970)	6
F.2d 1160 (1970)	6
**United States* v. *Johnson*, —— U.S. App. D.C. ——, 433	

OTHER REFERENCES

	Page
22 D.C. Code § 2201	1
22 D.C. Code § 2204	1
40 D.C. Code § 302 (d)	3
40 D.C. Code § 101 (j)	5

* Cases chiefly relied upon are marked by asterisks.

III

ISSUES PRESENTED *

In the opinion of the appellee, the following issues are presented:

I. Was there probable cause to arrest appellant for operating a motor vehicle after revocation of his permit, when the police officer observed him in the driver's seat of an automobile with the motor running and then ascertained that appellant's driver's permit had been revoked?

II. Did the trial court err in its instruction to the jury on the inference to be drawn from the unsatisfactorily explained possession of recently stolen property?

III. Was the evidence that appellant was found seated behind the wheel of a stolen car with the motor running and a key in the ignition sufficient to support his conviction for grand larceny and unauthorized use of a vehicle?

---

* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,614

UNITED STATES OF AMERICA, APPELLEE

v.

ROBERT WESTON, APPELLANT

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By a two-count indictment filed September 23, 1969, appellant was charged with grand larceny (22 D.C. Code § 2201) and unauthorized use of a vehicle (22 D.C. Code § 2204). Trial was held on May 5 and 6, 1970, before the Honorable William B. Bryant, sitting with a jury, and appellant was found guilty on both counts. On July 31, 1970, appellant was sentenced to be imprisoned for two to eight years on the grand larceny count and twenty months to five years on the unauthorized use of a vehicle count, the terms to run concurrently. This appeal followed.

The Government's Case

Mr. Louie Lamar Bailey testified that in the early morning hours of June 5, 1969, he returned to his apartment at 1631 Euclid Street, Northwest. He emptied his pockets and placed the contents on a coffee table in the living room. When he awoke at about 7:00 a.m., he discovered that his television set was gone. A further survey of the apartment revealed that his car keys were also missing; and when he went to the front of his apartment, he saw that his 1968 Pontiac Catalina [1] was missing from its parking space in front of the building (Tr. 28). Mr. Bailey next saw his car in the parking lot of the Thirteenth Precinct. He recognized it by the license tags and by the fact that it looked like the car that he had previously reported stolen (Tr. 29). Mr. Bailey did not know appellant, nor did he give him or anyone else permission to use the car on June 5 or June 25, 1969 (Tr. 30). The key case that was taken on June 5 contained a total of about five keys—two keys to Mr. Bailey's apartment, one key to his grandmother's house, and his two car keys.[2] The keys were returned to Mr. Bailey by Officer Petros on the day the case was before the grand jury (Tr. 30). On cross-examination Mr. Bailey denied that he had ever seen Mr. Weston or a man named Ernest and denied further that he picked up either of them and took them to his apartment on June 5 (Tr. 38-39).

The arresting officer, Salvatore Petros, was assigned on June 25, 1969, as a footman to patrol in the 1900 block of 14th Street, Northwest (Tr. 51). While on duty he saw a 1968 Pontiac with one occupant standing by the curb. The occupant, who was appellant, was seated directly behind the wheel with the motor running and the

---

[1] Mr. Bailey stated that the value of the automobile was approximately $3000 on June 5, 1969. He testified that he had bought the car in July 1968 and had paid $4200 (Tr. 29).

[2] Mr. Bailey remembered that he locked the bottom lock on his door but not the top lock in the early morning of June 5 (Tr. 30-31).

keys in the ignition (Tr. 52, 54-55). Officer Petros saw appellant throw a bag, containing trash, out of the left front window onto the street. The officer approached the vehicle and questioned appellant about the bag. Appellant alighted from the vehicle, picked up the bag, and placed it in the back seat of the car (Tr. 52). Officer Petros then asked appellant for his license and registration.[3] Appellant informed the officer that he had left his license and registration at home and that the automobile was registered in his wife's name but that he was making the monthly payments. A police call box was directly across the street from the car, so Officer Petros and appellant went to the call box, where a check was made as to the status of appellant's driver's permit. The Traffic Division informed the officer that appellant's license had been revoked, and appellant was then placed under arrest for operating after revocation.[4] He was subsequently transported to Third District Headquarters by a police wagon[5] (Tr. 52).

Officer Petros undertook a further examination of the car at Third District Headquarters since no registration card had been produced. The officer was informed by teletype that the vehicle was not exhibiting the correct license plates. When a further check was run by using the serial number of the auto, the teletype disclosed that the car was stolen. After receiving this information Officer Petros returned to the auto[6] and discovered that the correct license plate for the vehicle was concealed by another plate which had been placed over it (Tr. 53-54). Officer Petros ultimately learned that Mr. Bailey was the owner of the car and that it had been reported stolen.

---

[3] *See Mincy* v. *District of Columbia*, 218 A.2d 507 (D.C. Ct. App. 1966).

[4] 40 D.C. Code § 302 (d).

[5] There is no mention in the record whether the Pontiac was left on the street or whether it was driven or towed to the precinct.

[6] Again, there is no indication in the record whether the vehicle was at the precinct or still standing on the street.

The key ring that Officer Petros found in the ignition contained five keys and was returned to Mr. Bailey on the day that he testified before the grand jury (Tr. 55).

The Defense Case

Appellant was his own sole witness. He testified that he originally met Mr. Bailey on June 10, 1969 (Tr. 70). He was invited to Bailey's home one evening along with another man whom he knew only by the name of Ernest. He was given drinks by Mr. Bailey, and Mr. Bailey tried to get Ernest and appellant to have sexual relations with him (Tr. 71). Appellant refused and left. He saw Ernest drive by in the Pontiac as he was walking home.[7]

On June 25, 1969, appellant testified, he left the Touchdown Club at 20th and L Streets, Northwest, where he worked, and went by cab to a Chinese carry-out restaurant at 7th and O Streets, Northwest. He was then walking from 7th and O to his temporary residence at 1755 T Street, Northwest, when he was picked up by Ernest at 14th Street and Riggs Place (Tr. 81, 93-94).[8] After making a stop at 14th and T Streets, Ernest was asked by a man parked in front of him to help start his car (Tr. 64). Ernest was working on the car in front and appellant had moved to the driver's side when Officer Petros approached. Appellant testified that he never told the officer that Ernest was the driver of the car. He also said

---

[7] Appellant was not permitted to testify to anything that Ernest told him about Mr. Bailey (Tr. 76, 79). Ernest was never located and thus never interviewed by defense counsel (Tr. 79). Appellant testified that he had known Ernest for three or four weeks prior to his arrest, but that he did not know where Ernest lived or what he did for a living (Tr. 82). He did not know where Ernest was on the day of trial (Tr. 87).

[8] There is some confusion as to appellant's place of residence on June 25, 1969. He originally stated that he lived at 3219 13th Street, Northwest, and had been living there for two weeks (Tr. 84). However, after testifying that he was walking along Fourteenth Street on his way home when Ernest picked him up, appellant changed his temporary residence to 1755 T Street, Northwest (Tr. 95-96).

that Ernest was working on the automobile directly in front of the one in which he was seated and that he did not know what happened to Ernest, because Ernest seemingly disappeared when Officer Petros appeared on the scene (Tr. 88-89). According to appellant, the box of Chinese food dropped out of the car. He admitted in his testimony that he told the officer that he had a license and that the car was registered in his wife's name, and he also admitted that he was seated behind the wheel of the car (Tr. 65-68).

Appellant denied stealing the automobile and denied that he had ever unlawfully used the automobile (Tr. 63-81).

ARGUMENT

I. The facts within the officer's knowledge amounted to probable cause to arrest appellant for operating a motor vehicle without a permit.

(Tr. 50-56, 65-68, 87-90)

The arresting officer saw appellant behind the wheel of the automobile with the key in the ignition and the motor running. Appellant told the officer a false story about his license and registration, and the officer was able to determine that appellant had no license and that the automobile had been reported stolen to the Metropolitan Police. Appellant did not inform the officer that a third person had been driving the car, and no third person came forward on the scene (Tr. 88-89). In our view these facts, known to the arresting officer, clearly added up to probable cause to make an arrest for operating after revocation.[9]

---

[9] 40 D.C. Code § 302 (d). The definition of "operate" is found in 40 D.C. Code § 101 (j): "The terms 'operate' and 'operated' shall include operating, moving, standing or parking any motor vehicle or trailer on a public highway of the District of Columbia." A person is operating a vehicle even if it is merely standing or parked, if the person has the actual physical control to regulate the automobile's movements. *Houston* v. *District of Columbia*, 149 A.2d 790 (D.C. Ct. App. 1959); *see Taylor* v. *United States*, 259 A.2d 835 (D.C. Ct. App. 1969); *Richardson* v. *District of Columbia*, 134 A.2d 495 (D.C. Ct. App. 1957).

"Probable cause is a plastic concept whose existence depends on the facts and circumstances of the particular case." *Bailey* v. *United States*, 128 U.S. App. D.C. 354, 357, 389 F.2d 305, 308 (1967). It is "a reasonable ground for belief of guilt." *Carroll* v. *United States*, 267 U.S. 132, 161 (1925). The reasonable ground is established by the circumstances as they are unfolding to the police officer and must be viewed as he would have seen the situation in the light of his police experience. *Coleman* v. *United States*, 137 U.S. App. D.C. 48, 420 F.2d 616 (1969); *Bell* v. *United States*, 102 U.S. App. D.C. 383, 254 F.2d 82 (1958). Certainly the facts here gave Officer Petros a reasonable ground to believe that an offense was being committed in his presence and, therefore, probable cause to arrest appellant. Appellant's argument to the contrary is not persuasive.

II. The court correctly instructed the jury regarding appellant's possession of the recently stolen car.

(Tr. 135-139)

The trial court's instruction to the jury as to the inference which may be drawn from the possession of recently stolen property was an almost verbatim recitation of the suggested instruction in *Pendergrast* v. *United States*, 135 U.S. App. D.C. 20, 416 F.2d 776. *cert. denied*, 395 U.S. 926 (1969).[10] This instruction was to serve "as a model, not only in robbery cases, but by adoption in the prosecution of any larceny-type offense." 135 U.S. App. D.C. at 34, 416 F.2d at 790. In *United States* v. *Johnson*, —— U.S. App. D.C. ——, 433 F.2d 1160 (1970), this Court again held that the permissible inference instruction may be used for both grand larceny and unauthorized use of a vehicle. *See United States* v. *Howard*, —— U.S. App. D.C. ——, 433 F.2d 505 (1970).

In *Johnson*, *supra*, as in the instant case, the charges were grand larceny and unauthorized use of a vehicle

[10] The trial judge at Tr. 141 indicated his usage of the *Pendergrast* instruction.

arising out of the taking of one automobile. The instruction of the trial court, both as to the length of time between the taking of the car and the time when appellant was found in possession of it and as to appellant's explanation of that possession of the car (Tr. 137-138), followed almost exactly the suggested instruction in *Pendergrast* and was, we submit, free of reversible error.

III. The evidence was sufficient for the jury to convict appellant of both offenses.

(Tr. 3-149)

Appellant argues that the evidence was insufficient for the jury to convict. His basis for this contention is that Officer Petros' testimony should have been suppressed and that appellant satisfactorily explained his possession of the automobile.

The testimony of Office Petros was properly admitted. The officer had probable cause to arrest appellant,[11] and he testified as to what occurred at the time of arrest and what he learned as a result of the arrest. Appellant was given ample opportunity to explain his possession of the automobile and the circumstances surrounding that possession (Tr. 63-80). The jury had the right either to accept or to reject appellant's explanation. Appellant's simple recitation of an explanatory story does not negate a possible permissible inference to be drawn by the jury and thereby preclude the trial judge from submitting the case to the jury.

The attempt by appellant to introduce evidence as to what the third person, Ernest, told him about the car was properly excluded by the trial court (Tr. 78-79). Hearsay evidence, if otherwise competent, may in some situations be admitted at the discretion of the trial judge. *United States* v. *Harris*, D.C. Cir. No. 23,254, decided November 27, 1970. Here, however, the trial judge chose to exclude testimony concerning what Ernest told

---

[11] See argument I, *supra*.

appellant after questioning appellant's counsel as to Ernest's whereabouts on the day of trial (Tr. 79-80). In light of appellant's vague description of his acquaintance with Ernest (Tr. 82-83) and his acknowledged failure to point out Ernest to Officer Petros at the time of arrest (Tr. 87-90), the action of the trial judge was quite proper.

The Government's evidence showed that Mr. Bailey's automobile was taken on June 5 (Tr. 29) and that appellant was not given permission to use this automobile on either June 5 or June 25 (Tr. 30). Appellant was seen on June 25 by Officer Petros directly behind the wheel of Mr. Bailey's 1968 Pontiac with the motor running and the keys in the ignition (Tr. 52, 55). Appellant was the only person in the car (Tr. 52). He admitted that he told the police officer a false story about his driver's permit and the registration card (Tr. 66-69). He also admitted that he did not inform Officer Petros about the alleged third person, Ernest (Tr. 89). On such evidence, particularly when it is juxtaposed against appellant's uncorroborated story, a reasonable jury could certainly find guilt beyond a reasonable doubt. *Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375 F.2d 332 (1967); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947).[12]

---

[12] Appellant also raises the argument that the court erred in convicting and sentencing appellant on both grand larceny and unauthorized use of a motor vehicle since the latter charge is a lesser included offense of the first charge. We submit that *United States* v. *Johnson*, *supra*, and *Evans* v. *United States*, 98 U.S. App. D.C. 122, 232 F.2d 379 (1956), are dispositive as to this issue.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
JOHN S. RANSOM,
WILLIAM H. SCHWEITZER,
Assistant United States Attorneys.

APPENDIX

The court instructed the jury as follows:

Now, in connection with both of these offenses charged, there is a theory in the law which has to do with, and I believe both counsel have made reference to it, some inference which might be drawn from the possession of recently stolen property.

And in connection with this theory, this principle of law, the Court instructs you in this fashion. In weighing the evidence, adduced at this trial, you may consider the circumstances, if you find that it is established beyond a reasonable doubt that the defendant had the exclusive possession of this automobile in question, Mr. Bailey's automobile, and this is the property specified in counts, both, one and two. If you find that the defendant had exclusive possession of this property, after that property was stolen, as alleged, by the complainant, you may draw certain inferences.

You are not required to draw any conclusion from that circumstance, but you are permitted to infer from the defendant's unexplained or unsatisfactorily explained possession of the recently stolen property, that the defendant is guilty of the offense of taking the property, if, in your judgment, such an inference is warranted by the evidence as a whole.

Now, the defendant's possession of recently stolen property, does not shift the burden of proof from the government, to the defendant. The burden is always upon the government to prove beyond a reasonable doubt, every essential element of the offense, before the defendant may be found guilty of that offense, before you may draw any inference from the defendant's unexplained or unsatisfactorily explained possession of property stolen, as alleged in this indictment.

You must find that the government has proved beyond a reasonable doubt, every essential element of the of-

fense of grand larceny, as I have outlined the element of that offense to you. Or, if in the second count, the elements of the offense of unauthorized use of the motor vehicle, as I have outlined those elements to you. If you should find that the government has proved beyond a reasonable doubt, every essential element of these offenses, as I have outlined them to you, the defendant's unexplained or unsatisfactorily explained possession of the recently stolen property, is a circumstance from which you may, by the process of inference, find, that the defendant was the person who took the property.

In short, if you find the government has proved beyond a reasonable doubt, every essential element of the offense of grand larceny in the first count, then, but only then, the defendant's unexplained or unsatisfactorily explained possession of the property permits you to infer that the defendant was the person who took it.

The word "recently," used in these instructions, is a relative term, and it has no fixed meaning, whether the property would be considered recently stolen, because that depends upon the facts and circumstances shown by the evidence. The longer period of time since the theft of the property, the more doubtful becomes the inference which may be drawn from the unexplained or unsatisfactorily explained possession by the defendant.

It is exclusive within your providence [*sic*] as jurors, to determine, in the first count of the indictment, whether the property specified in the count, was, in fact, stolen as alleged. And if so, whether, while recently stolen, it was in the exclusive possession of the defendant. And if so, whether the possession of the property has been satisfactorily explained or whether the evidence as a whole, warrants any such inference. If you should find that the government has proved beyond a reasonable doubt, every essential element of the offense of grand larceny, as I have outlined it to you in count one, and the property, the automobile was stolen, as alleged, and that while recently stolen, was in exclusive possession of the de-

fendant. You may draw, but you are not required to draw, from the circumstances, the inference that the defendant is guilty of the offense as charged in count one.

If you should find that the government has failed to prove beyond a reasonable doubt, every essential element of the offense of grand larceny in the first count, or unauthorized use in the second count, or if you should find that the government has failed to prove beyond a reasonable doubt that the property specified in this count, was in the exclusive possession of the defendant while recently stolen, or if the defendant's possession of the stolen property was satisfactorily explained by other circumstances shown by the evidence, or by the evidence as a whole, you have reasonable doubt as to the defendant's guilt, then you must find the defendant not guilty of the offenses, as charged in the indictment. (Tr. 135-139.)

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 416916 514